

CHAN SIO v. DAN SIN WAH

[O. C. J. (Wilson J.) May 27, 1955]

[Kuantan — Civil Suit No. 21 of 1953]

Civil Procedure Code (Cap. 7), s. 469—Originating Summons—Service on persons whose rights or interests are sought to be affected—Effect of non-service—Order set aside.

This was an application to set aside the order obtained in a Japanese Court in 1944 sanctioning the sale of certain trust property. It appeared that the Originating Summons on which the order was made was not served on the beneficiaries under the trust, who were then infants.

Held: as the Summons had not been served on the persons whose rights or interests were sought to be affected thereby, the order made thereon was a nullity and must be set aside.

Cases referred to:—

- (1) *Dan Sin Wah v. Chan Hai Swee* (1951) M.L.J. 189.
- (2) *Alagappa Chettiar v. Ramaratnam Naidu* (1951) M.L.J. 161.
- (3) *Re Maria Huberdina Hertogh, an infant* (1950) M.L.J. 214.
- (4) *Craig v. Kanssen* (1943) 1 K.B. 256.

APPLICATION to set aside Order of Japanese Court.

N. A. Marjoribanks for the plaintiff.

Morris Edgar for the defendant.

Cur. Adv. Vult.

Wilson J.:—It is not disputed that on the 27th day of April, 1937, the plaintiff's father, Chan Hock Choon, executed a declaration of trust of certain land in Pahang in favour of his two sons, namely, the plaintiff and the plaintiff's elder brother, Chan Hai Swee, and that during the Japanese Occupation in 1944 Chan Hock Choon applied to a Japanese Court for an order to sell an undivided half share of the land and, having obtained permission, sold it to the defendant Dan Sin Wah, who was clearly aware of the trust. Chan Hock Choon applied by way of an Originating Summons which was served on nobody. However, the two sons appeared before the Judge of the Japanese Court and are recorded as having said that they agreed to the application of the father. The Originating Summons was never served upon them and no *guardian ad litem* was ever appointed. The Court made an order that Chan Hock Choon be at liberty to sell the said undivided half share and he effected a transfer of this to the defendant, although the plaintiff and his brother have been in possession of the land ever since and taken for themselves any profits there may have been out of the cultivation of the land.

By Kuantan Civil Suit No. 17 of 1950⁽¹⁾ the present defendant Dan Sin Wah brought an action against

Chan Hai Swee in regard to this transaction. At that time the order of the Japanese Court had not been set aside, and I think it is sufficient comment on that case to say in addition that the learned Judge pointed out that the plaintiff in this case Chan Sio, who was at that time still an infant, had not been joined as a defendant and was not bound by any decision that he made in that case. Chan Sio has now attained his majority and brings this action claiming to set aside the Japanese order dated the 18th day of August, 1944, sanctioning the sale of the said trust property. It appears to me that if the order of the Japanese Court was a nullity that is the end of the matter and the various provisions of the local Ordinances which were quoted to me have no bearing on the matter. In *AL. Alagappa Chettiar v. Ramaratnam Naidu*⁽²⁾, the learned Judge held that an order obtained by an administrator for sale of estate properties belonging to the estate of an intestate without service of the application on some persons mentioned in section 469 of the Civil Procedure Code is a nullity. Section 469 provides that where a summons is taken out by a trustee for the approval of any sale or other transaction the summons shall be served on the persons or one of the persons whose rights or interests are sought to be affected. In this case the application to the Japanese Court definitely affected the rights of the plaintiff and his elder brother and they were never served. At that time they were infants. That would appear to be quite immaterial having regard to the decision in *Re Maria Huberdina Hertogh, an infant*⁽³⁾. In that case the Originating Summons was not served on the infant Maria or on Amina binte Mohamed, the person who had custody of her, and it was held by the Court of Appeal that the proceedings were by reason of the non-service of the necessary parties a nullity and the orders made thereon must, therefore, be set aside. I propose to refer to one further case and that is *Craig v. Kanssen*⁽⁴⁾, in which it was held that a person who is affected by an order of Court which can properly be described as a nullity is entitled to have it set aside.

The claim of the plaintiff must succeed and I order that the Japanese order dated the 18th day of August, 1944, sanctioning the sale of the said trust property be set aside and I make a declaration that the defendant holds the said trust property in trust for the plaintiff, and I make an order that the defendant do within seven days transfer the said trust property to the plaintiff and in default thereof that the Registrar of this Court do sign the Memorandum of Transfer for the defendant in respect of the said trust property to the plaintiff.

In his plaint the plaintiff also claims an enquiry as to the rents and profits of the said trust property and an order that the defendant do pay such rents and profits to the plaintiff. As the defendant has never been in possession of the property and has received no rents or profits that part of the claim has been withdrawn. The defendant must pay the costs of this Suit.

Order accordingly.

Solicitors : *Lovell & Hastings; Bannon & Bailey.*

**OFFICIAL ADMINISTRATOR, K.L.
v. CHINA INSURANCE CO. LTD.**

[O. C. J. (Buhagiar J.) June 14, 1955]

[K. L. — Civil Suit No. 141 of 1955]

Civil Procedure Code (Cap. 7) s. 459 — Summary procedure — Not applicable where the claim is on a Statutory debt.

In this case the plaintiff had instituted a suit under the summary procedure. In that suit he stated that in an action against one L.N. to recover damages in respect of fatal injuries and consequent loss and expense sustained by the deceased P.C. judgment was entered in his favour against the said L.N. for a sum of \$18,000 and costs and that such liability of the said L.N. was covered by the terms of a policy of insurance issued to L.N. by the defendants as approved insurers within the meaning of reg. 2 of the Motor Vehicles Third Party Risks Regulations. The plaintiff claimed that by reason of reg. 8 of the said Regulations the defendants were liable to pay him the said judgment for \$18,000 and the costs. The defendants applied by Summons in Chambers for an order that the suit be dismissed on the ground that the plaintiff was suing on a Statutory debt and therefore the provisions of s. 459 of the Civil Procedure Code dealing with summary procedure did not apply.

Held: (1) the claim in this case was on a Statutory debt and not on debt based on an express or implied contract and therefore outside the scope of s. 459 of the Civil Procedure Code; (2) in this case the order necessary for the ends of justice and to prevent abuse of process of the Court is an order amending the error so that the suit may proceed as a non-summary procedure suit.

Case referred to:—

- (1) *China Insurance Co. Ltd. v. Margaret Paramor* F.M. Civil Appeal No. 31 of 1955 — unreported.

SUMMONS IN CHAMBERS adjourned to open Court.

D. G. Rawson for the plaintiff.

H. L. Wigglesworth for the defendant.

Cur. Adv. Vult.

Buhagiar J. : — This is a summons in Chambers, adjourned to open Court, in which the defendant applied for an order that the suit be dismissed with costs. The plaintiff instituted a suit under the summary

procedure; in this suit the plaintiff stated that in an action against one Lee Ngiow to recover damages in respect of fatal injuries and consequent loss and expense sustained by the deceased P. Chellappah judgment was entered in his favour against the said Lee Ngiow for a sum of \$18,000 and costs, that such liability of the said Lee Ngiow was covered by the terms of a policy of insurance issued to Lee Ngiow by the defendants as approved insurers within the meaning of regulation 2 of the Motor Vehicles Third Party Risks Regulations; he claimed that by reason of regulation 8 of the Motor Vehicles Third Party Risks Regulations the defendants were liable to pay him the said judgment for \$18,000 and costs in the said civil suit.

Mr. Wigglesworth for the defendant submitted that the plaintiff is claiming on a statutory debt and therefore the provisions of section 459 of the Civil Procedure Code dealing with summary procedure do not apply. He pointed out that that section differs from Order 3 rule 6 of the English Rules of the Supreme Court in that in that Order special provision is made for special indorsement in an action where the plaintiff seeks to recover a debt or liquidated demand in money arising on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty. Counsel argued that in this case there is no privity of contract between the plaintiff and the defendant and that, as stated in the statement of claim, the defendant is sued by reason of the provisions of regulation 8 of the Motor Vehicles Third Party Risks Regulations. The learned Counsel referred to the judgment of the Court of Appeal in *China Insurance Co. Ltd. v. Margaret Paramor*⁽¹⁾, where the Court expressed the view that the claim (similar to the claim of the plaintiff in this case) was a statutory debt and not a debt based on an express or implied contract and therefore outside the scope of section 459.

Mr. Rawson, Counsel for the plaintiff raised some preliminary points with which I shall deal later. With regard to the substantive point he submitted that the rule of privity of contract suffers an exception in the case of motor insurance contracts. He referred to *Cheshire and Fifoot on Contracts* and to *Hector Hughes: Road Users' Rights, Liabilities and Insurance*, 1938 ed. where at p. 184 it is stated:—

"The general rule is that rights and obligations conferred by contract are personal to the contracting parties, and do not devolve upon strangers to the contract even though the contract itself purports to achieve this end. This rule suffers considerable modification when applied to motor insurance contracts. So far as compulsorily insurable risks are concerned, the insurers' undertaking may be enforced against them not only by the insured, (and persons who, by novation or assignment, are put in his place) but also by other parties whom the policy purports to cover (section 36(4), Road Traffic Act, 1930),